IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1756

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS

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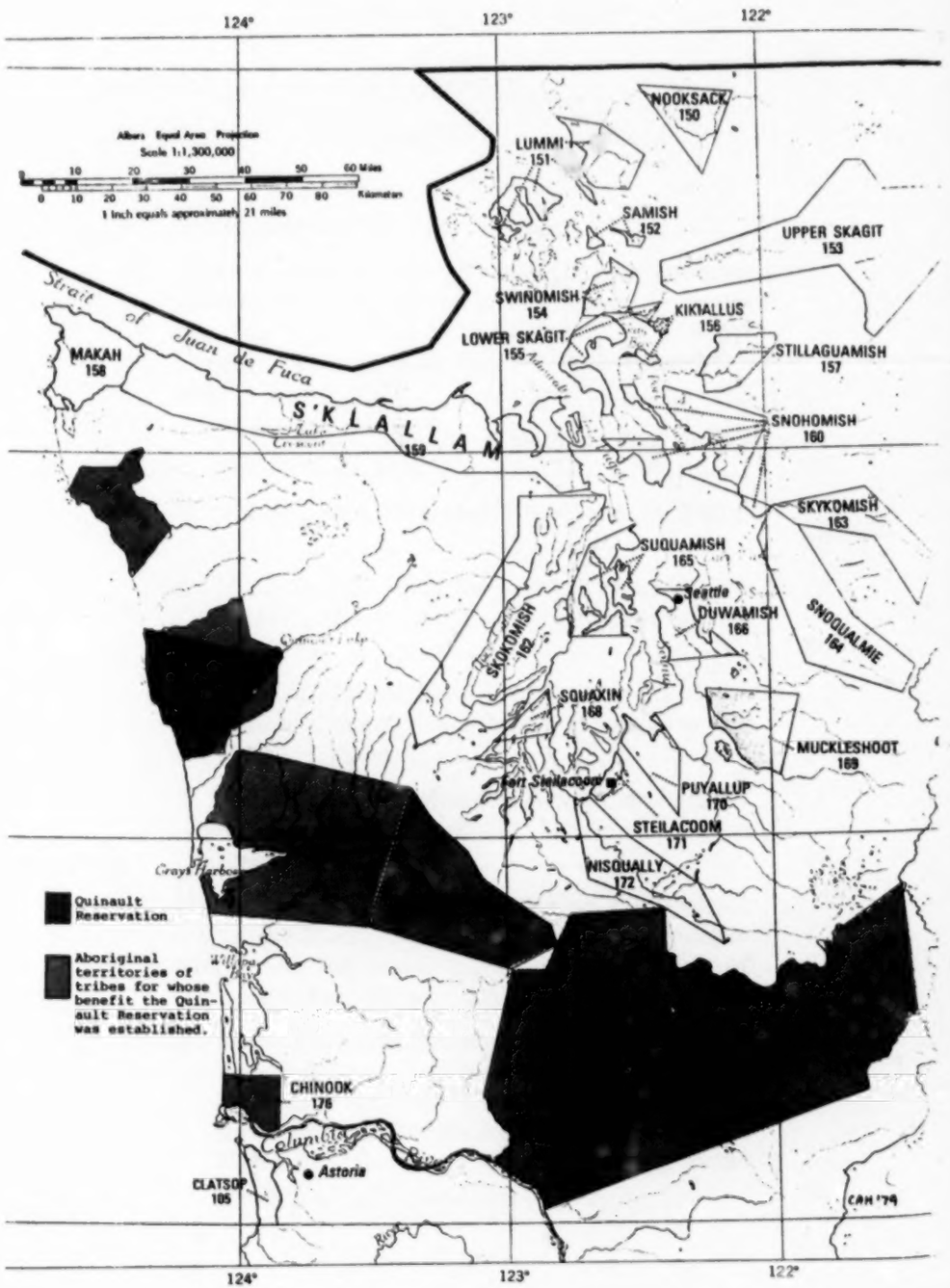
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STATEMENT OF THE CASE

The Justice Department's brief understandably omits many of the relevant background facts of this case,[1] so we shall make a separate statement. The plaintiffs in

[1] We refer to the petitioner as "the Justice Department" rather than "the Government," because the Interior Department, the agency of the United States legally responsible for carrying out the trust duties owed to these plaintiffs (see note 10 below) does not agree with the Justice Department that the court lacks jurisdiction.

this case are 1,465 individual Indians and the Quinault Tribe, who are beneficial owners of trust land on the Quinault Indian Reservation, Washington.[2] The defendant is the United States, which is the trustee of the plaintiffs' land.

The individual plaintiffs are descendants of the Indians of several tribes who originally owned and occupied the Pacific coastal region of the United States north of the Columbia River. In 1855 the Government entered into a treaty with some of these tribes. Treaty of Olympia (ratified in 1859), 12 Stat. 971. The signatories to the treaty were the Quinault and Quileute Tribes.[3] The Government wanted the other neighboring tribes to sign the treaty, but they refused to do so.[4] Nevertheless, after the treaty, the Government treated them as if they had signed the treaty, and patented their lands to settlers (see note 4).

The treaty called for a reservation to be selected by the President. In 1873 the President set aside some 200,000 acres within the Quinaults' territory (see map, frontispiece), and declared that this reservation would be "for the use of the Quinault, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast . . . ." 1 Kapp. 923 (November 4, 1873). The

[2] Another plaintiff is the Quinault Allottees Association, an unincorporated association of Quinault Reservation allottees. The 1,465 individuals today own about 130,000 acres of trust land on the Reservation. The Quinault Tribe today owns approximately 4,000 acres of trust land on the Reservation.

[3] The signatories included the Queets and Hoh, which were subtribes of the Quinault and Quileute, respectively.

[4] The principal other tribes were the Chehalis, Chinook, and Cowlitz Tribes. *See* 8 Ind.Cl.Comm. 436, 441-444, 473 (1960) (Chehalis); 6 Ind.Cl.Comm. 177, 183-195, 207 (1958) (Chinook); 21 Ind.Cl.Comm. 143, 151, 166-170 (1969) (Cowlitz); and see map, frontispiece.

"other tribes of fish-eating Indians" included the Chehalis, Chinook and Cowlitz Tribes.[5]

The Reservation was heavily forested, and for that and other reasons, none of the non-Quinault Indians moved to the Reservation, but continued to live where they always had lived. Consequently, after the Reservation was established, only the Quinaults lived there, as they always had, in the Indian villages of Taholah and Queets.

In 1905, the Government began to allot the Reservation in trust to individual Indians pursuant to the Treaty of Olympia, the Executive Order of 1873, and, especially, the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 348. See also Act of March 4, 1911 ("Quinault Allotment Act"), 36 Stat. 1345 (1911).

By 1933, the Reservation had been completely allotted, with 2,340 trust allotments, usually 80 acres each and heavily timbered. Most of the allottees belonged to the tribes other than Quinault, and were, as stated above, non-residents of the Reservation. Each allottee received a deed, signed in the name of the President of the United States, containing language pursuant to Section 5 of the General Allotment Act to the effect that the United States would hold the allotment for a period of 25 years,

> ". . . in trust for the sole use and benefit of the Indian . . . or, in the case of his decease, of his heirs . . . ."[6]

The trust period was extended indefinitely by Sec. 2 of the Indian Reorganization Act of 1934, 25 U.S.C. § 462.[7]

[5] *Halbert* v. *United States*, 283 U.S. 753 (1931).

[6] 25 U.S.C. § 348; for the full language in the trust patent see *Squire* v. *Capoeman*, 351 U.S. 1, 4 n.6 (1956), involving a plaintiff herein.

[7] The trust relationship with the Quinault Tribe was established by the Treaty of Olympia, 12 Stat. 971. The Tribe acquired some of its trust land pursuant to Sec. 5 of the Indian Reorganization

While the statutory plan contemplated that allottees would take up residence on their allotments and engage in farming or grazing,[8] that was a practical impossibility on the Quinault Reservation due to the heavy forestation. Even today, the great majority of allottees still live off the Reservation, some on other Indian reservations, some in rural or urban non-Indian communities. Approximately one-third of the land on the Reservation has gone out of trust, either through sales to non-Indians or inheritance by persons ineligible to own trust land.[9] As a result, the Reservation today is a complex checkerboard of trust allotments and former trust allotments. Many of the trust allotments are in "heirship status", meaning they are held in undivided ownership by numerous heirs (sometimes hundreds) of the deceased original allottees, often rendering use by any one of the heirs impracticable.

From the time the Reservation was established, the Government exercised complete control over its land and timber. However, it was not until the Act of June 25, 1910, 36 Stat. 857, 25 U.S.C. §§ 406 and 407, that the Secretary of the Interior was authorized to sell Indian timber. Starting in 1920, the Government began to undertake sales of the Quinault allottees' timber, usually under long-term, large-volume contracts made up of many allotments. There have been 14 such contracts since

Act, 25 U.S.C. § 465. The Tribe also acquired some land in trust by express grant from Congress. *See, e.g.*, 76 Stat. 913 (1962), setting aside a tract of land on the Reservation "in trust for the Quinault Tribe of Indians . . . ."

[8] *See* General Allotment Act, Sec. 1, 25 U.S.C. § 331. The assumption that this policy was feasible on the Quinault Reservation was the basis for this Court's decision allowing the allotment of the forested land. *United States* v. *Payne*, 264 U.S. 446, 449 (1924).

[9] Opinion below, reprinted in Govt. Petn. for Certiorari, "Pet. App." 2a. For a more detailed history see *Quinault Allottee Ass'n* v. *United States*, 485 F.2d 1391, 1392-1395 (Ct. Cl. 1973).

1920, one of which (the Crane Creek Unit) is still ongoing, and another of which (the Taholah Unit) was just completed in April, 1979.

The Government, through the Secretary of the Interior and the Bureau of Indian Affairs (BIA),[10] has continuously exercised total control over the management and disposition of the Indians' lands and timber on the Quinault Reservation. The BIA determines which blocks (units) of timber are to be put up for sale.[11] It then obtains a power of attorney from each allottee owning land within the unit (or a resolution from the Tribe in the case of tribal land), after which the BIA handles every detailed aspect of a sale—advertisement for bids, letting of contracts, and supervision of the loggers who build roads, cut the timber, and remove it. After the contract commences, the BIA oversees the scaling and grading of logs, collects the sale proceeds monthly, deducts its fees, and credits the balance to the Tribe's or allottees' BIA accounts. The Indians have nothing to do with the entire operation, except (1) signing the initial power of attorney, and (2) opening the envelope five or ten years later (or more) with their check.[12] Most

[10] 43 U.S.C. § 1457 and 25 U.S.C. § 2.

[11] The Justice Department (Br. 5-6) speaks of the Secretary as being authorized "to consent to the sale of timber by the owner." The reality on the Quinault Reservation has been that the Secretary decided what should be sold and when, and the owner simply signed the power of attorney brought to him.

[12] The BIA's control over Quinault logging operations was described in *United States* v. *Eastman*, 118 F.2d 421, 424 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941), as follows:

> ". . . Departmental regulations and instructions governing in detail the sale of timber on allotted as well as unallotted lands have been in force virtually from the inception of the [1910 Act].
>
> "The trial court thought that [under the 1910 Act] the statutory power of the Secretary was limited to the veto of

allottees have substandard education and do not even know the physical location of their allotments on the Reservation. They are totally reliant upon the Government to manage their timber.[13] Practically none of them earns anything from his allotment, except when the once-in-a-lifetime timber sale occurs.

An Indian owner is not even allowed to cut and sell timber from his own allotment without the permission of the BIA and without posting a bond to assure compliance with the BIA's harvesting regulations.[14] Thus, the trust responsibilities of the Government here are not passive; the BIA has exercised active and total control over the management of the Indians' land and timber,

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a sale 'improvident from the standpoint of price.' [31 F.Supp. 761.] But equally important is the exaction of guarantees that the price agreed upon will be paid. Essential also to a provident sale of live timber are provisions for the protection of young growth in the process of logging, stipulations relating to the permissible height of stumps, to the disposition of slashings in such way as to mitigate the fire hazard, and many others. Details of this sort are prescribed at length in the fifty-odd regulations made a part of the present contracts. It is obviously impossible for the Secretary to confer with each allottee concerning the terms and conditions of a proposed contract. He must of necessity promulgate general rules."

[13] *See* Plaintiffs' Exhibits JT-1, at 70-95; VR-1, at 144-148 and 153-159; and BL-1, at 72-89, for a detailed discussion of the allottees' total reliance upon the BIA to manage their timber and the BIA's expectation and encouragement of that reliance

[14] 25 C.F.R. § 141.19 (1979). The impotence of the plaintiffs with respect to the logging of their lands is evidenced in fairly recent litigation. In the late 1950's, congressional hearings revealed that the Government was allowing the loggers credit for improper costs. Due to strong congressional criticism, the Government was prodded into suing the loggers in its capacity as trustee to recover the money for the Indians. *United States* v. *Aloha Lumber Corp.*, No. 3168 (W.D. Wash.); *United States* v. *Rayonier, Inc.*, No. 3169 (W.D. Wash.). The Government, however, ended up settling the lawsuits in 1969 for a fraction of the claim, over the express written protest of the allottees (who had just organized into the Quinault Allottees Association).

and the allottees have always relied upon the BIA to do so.

This case was filed in 1971, three years after the allottees had organized for the first time across tribal lines into the Quinault Allottees Association for purposes of investigating possible acts of mismanagement of their land and timber by the Government and bringing this lawsuit.[15] The many acts of mismanagement alleged are itemized in the opinion below, Pet. App. 2a-3a. The main claims are for failure to obtain adequate prices for the timber sold, and failure to arrange for reforestation after logging.

At the time these claims were filed (1971), the Court of Claims was on record as holding that it had jurisdiction over breach of trust damage claims such as these,[16] and no one questioned this until the Justice Department filed its motion to dismiss on Sep. 30, 1977.

This case has already been the subject of three decisions by the Court of Claims. In the first, *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971), the court held that the statute of limitations barred a claim by one of the individual plaintiffs but recited that the court had jurisdiction. 440 F.2d at 1002. In *Quinault Allottees Ass'n* v. *United States*, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974), the court ruled against the Indians again, and held that the United States was entitled to deduct a management fee from the proceeds of the Quinault allottees' timber sales. The court did not question its jurisdiction. 485 F.2d at 1392.

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[15] The suit originated when tribal and allottee leaders approached the general counsel of the Quinault Tribe in 1967 to ask that an investigation be made into rumors that Indian timber was being sold by the BIA for notoriously low prices.

[16] *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966); *Navajo Tribe* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966).

In *Quinault Allottees Ass'n* v. *United States*, 453 F.2d 1272 (Ct. Cl. 1972), the court held that the allottees met the requirements of a class action under its rules. However, it made the case an "opt-in", rather than an "opt-out", class action. Consequently, the 531 then-plaintiffs held regional meetings in the Pacific Northwest and made several mass mailings, followed by voluminous communications back and forth with prospective plaintiffs in order to explain the various claims to them and give them an opportunity to "opt-in" if they wished to join the case. Over 900 additional Indians chose to do so, making a total of 1,465 plaintiffs, which is believed to be a very substantial majority of all potential claimants.

During and after these three partial adjudications, the plaintiffs engaged in discovery for six years, including more than a dozen depositions, extensive searches of Government records, the development of over 20,000 pages of exhibits by plaintiffs (which were turned over to the Justice Department in 1977), and extensive investigation and preparation of reports by numerous expert witnesses in anticipation of trial.[17]

The trial was divided into several phases. The first phase, covering historical and ethnological aspects of the case, was held in Seattle in early 1977, lasting three weeks. Following this trial, the Justice Department filed a motion to dismiss the case for lack of jurisdiction, thereby suspending all further proceedings.[18]

[17] During 1971-1977, the allottees paid expenses of over $730,000, primarily for the fees and expenses of 12 expert witnesses (attorney time is on a contingent fee basis). These expenses have been paid from a fund derived from a voluntary two percent contribution from the allottees' timber sale proceeds.

[18] The suspension was a serious blow to the momentum and cohesiveness of plaintiffs' team of expert witnesses. In addition, one of plaintiffs' principal expert witnesses, scheduled to testify in the second phase of the trial, has unfortunately died in the interim.

The Court of Claims, sitting *en banc*, denied the Justice Department's motion. Pet. App. 1a-21a (Jan. 24, 1979). The court held that the trust relationship between the Government and the plaintiffs established by the General Allotment Act could "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" because of a proven breach of trust. Pet. App. 6a. The court reasoned that this result was precisely what Congress intended when it passed the Indian Claims Commission Act in 1946, 60 Stat. 1049. Pet. App. 9a-11a.

SUMMARY OF ARGUMENT

The central question is the effect on this case of *United States* v. *Testan*, 424 U.S. 392 (1976). *Testan's* basic teaching is that the Tucker Act, 28 U.S.C. § 1491, does not in itself waive sovereign immunity from a suit for damages. That waiver must be found expressly or impliedly in some other source—the Constitution, a statute, a contract, etc.

We agree, of course, that these plaintiffs must satisfy the principles reaffirmed in *Testan*, and it is clear that they do satisfy them.

By various treaties, statutes, executive pronouncements, and conduct, the United States has undertaken a fiduciary relationship with the Indians of this country. This is true for Indians generally, and it is particularly true for the plaintiffs here because of the General Allotment Act, 25 U.S.C. § 348, under which each plaintiff has an express trust relationship with the United States. This fiduciary relationship carries with it by implication, as a constituent part of the relationship, the liability to respond in damages if the fiduciary duties are breached. This liability could not be sued upon prior to 1946 without a special jurisdictional act because, by statute and judicial

decision, the Tucker Act had been made inapplicable to Indian claims.

However, in 1946 Congress removed that bar, and from then on, Indian breach of trust claims could be filed under the Tucker Act (or under the parallel act applicable to tribal claims, 28 U.S.C. § 1505).

The Justice Department's position is that while Congress lifted the bar to some Indian claims, it did not intend to lift the bar to Indian breach of trust claims. The 1946 Congress would have been very surprised to hear this. The legislative history is plain that breach of trust claims were among those to which Congress was lifting the bar.

Our first line of argument (Section II) is that the legislative history of 28 U.S.C. § 1505 shows an express waiver of sovereign immunity, so that the Court of Claims has jurisdiction over these breach of trust claims under the Tucker Act and 28 U.S.C. § 1505. For example—

> "[S]ection 24 of the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims, *so it will never again be necessary to pass special Indian jurisdictional acts* in order to permit the Indians to secure a court adjudication on *any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future.*" 92 Cong. Rec. 5313 (1946) (emphasis added).

And—

> "The Interior Department itself has suggested that it ought not to be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability . . . ." 92 Cong. Rec. 5312 (1946).

Our second line of argument (Section III) is that, entirely aside from the legislative history, waiver of immunity so that suit may be filed under the Tucker Act, is accomplished:

(a) By the fiduciary relationship itself, which implies that the beneficiary may sue for damages for breach of trust;

(b) By various statutes spelling out specific duties of the United States. These duties, such as to insure reforestation after logging, 25 U.S.C. § 466, or to invest Indian moneys, 25 U.S.C. § 162a, carry with them the implied liability to respond in damages if they are improperly discharged;

(c) By the fact that these particular trusts are tantamount to implied contracts, and may be sued upon as such under the Tucker Act under ordinary implied contract jurisdiction.

(d) By the fact that when the Government has possession and control of trust property, a claim for mismanagement of that property is tantamount to a claim for "money improperly exacted or retained," and is cognizable under the Tucker Act without more.

The judgment of the Court of Claims should be affirmed.

ARGUMENT

I. Introduction—The *Testan Case.*

But for *United States* v. *Testan*, 424 U.S. 392 (1976), it is doubtful that the Justice Department would ever have questioned the Court of Claims' jurisdiction to award damages on an Indian breach of trust claim. This jurisdictional question was first resolved by the Court of Claims in 1966 in the Indians' favor, *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966), and until the Justice Department raised the issue in the instant case in 1977, everyone thought that the matter was settled.[19]

The Justice Department's brief is so filled with references to *Testan* that we feel compelled to address *Testan* briefly before presenting our main arguments. However, this brief discussion will show that there is nothing in *Testan* which undercuts the Court of Claims' jurisdiction over these claims.

Testan did not establish new law; it merely reaffirmed previous law, and applied it to the facts before the Court. It cited with approval *Eastport Steamship Co.* v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967), which held that the waiver of sovereign immunity must be found outside the Tucker Act, and may be found by implication. It was *Eastport* that formulated the "fairly . . . mandating compensation" test approved in *Testan.*

It is true, as the Justice Department says (Br. 15), that there is language in *Testan* to the effect that the waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." [20]

[19] The Justice Department did half-heartedly contest jurisdiction in the Court of Claims in *Mason* v. *United States*, 461 F.2d 1364 (Ct. Cl. 1972), but dropped the issue on review in this Court, 412 U.S. 391 (1973).

[20] 424 U.S. at 400, citing *United States* v. *King*, 395 U.S. 1, 4 (1969).

However, it is obvious that this language overstates the proposition, and was merely dicta if applied to situations other than the one addressed in *King*. The *King* case dealt with the question of whether the Court of Claims has jurisdiction to grant declaratory judgments. It was not unreasonable for this Court, in rejecting that proposition, to say that the grant of such extraordinary jurisdiction "cannot be implied but must be unequivocally expressed." But it would not be correct to apply the same language, for example, to the question of whether the court had jurisdiction to award compensation for Fifth Amendment takings, *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933), or for denial of emoluments of a civil service position lawfully held, *United States* v. *Wickersham*, 201 U.S. 390, 399 (1906), both of which are causes of action against the United States allowed by implication.

This Court in *Testan* was well aware that waivers of sovereign immunity may be found by implication. Not only did it refer to the *Jacobs* and *Wickersham* cases, 424 U.S. at 401 and 402, but it specifically approved language in *Eastport* to the effect that waiver may be found by implication. We believe that the following language in *Testan* is the governing language:

> ". . . entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl., at 607, 372 F.2d, at 1009; *Mosca* v. *United States*, 189 Ct. Cl. 283, 290, 417 F.2d 1382, 1386 (1969), cert. denied, 399 U.S. 911 (1970). We are not ready to tamper with these established principles . . . ." [21]

and

> ". . . the basis of the federal claim—whether it be the Constitution, a statute, or a regulation—does

[21] 424 U.S. at 400.

not create a cause of action for money damages unless, as the Court of Claims has stated, that basis in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl., at 607, 372 F.2d, at 1008, 1009." [22]

The plaintiffs' claims are "fairly mandated" by the legislative history of 28 U.S.C. § 1505, the existence and nature of the trust relationship, and the numerous statutes spelling out the Government's fiduciary duties, see Sections II and III below. These claims meet every requirement set forth in *Testan* and its predecessor cases such as *Eastport*.

II. These Breach of Trust Claims Can Be Brought Under Section 24 of the Indian Claims Commission Act, 28 U.S.C. § 1505, Because This Is What Congress Clearly Intended When It Passed the Act.

In enacting Section 24 of the Indian Claims Commission Act (now 28 U.S.C. § 1505) in 1946, Congress waived sovereign immunity for Indian breach of trust damage claims, and intended that these claims could be filed thereafter in the Court of Claims without the necessity of further jurisdictional acts. The legislative history of this Act and the relevant case law make it clear that the Government's general fiduciary duty to Indians is a sufficiently definite and enforceable duty that an allegation of its breach states a good cause of action under 28 U.S.C. § 1505. Section 1505 provides:

> "The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

[22] 424 U.S. at 401-402.

A. *The General Fiduciary Duty of the United States to Indians.*

The United States has a fiduciary responsibility to the Indians within its borders, including these plaintiffs. This responsibility has been recognized repeatedly by the Congress, the Executive and the Judiciary, from the earliest days of the Republic to the present.[23]

1. *Congressional Recognition of the Fiduciary Duty.*

The first congressional recognition of the Government's fiduciary duty to Indians was in the Northwest Ordinance of 1787,[24] ratified by the First Congress in 1789, 1 Stat. 50. Article III provided that:

> "The utmost good faith shall always be observed toward the Indians . . . and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them . . . ."

[23] Good general reviews of the trust relationship appear in Letter, Solicitor of the Interior Dept. Krulitz to Assistant Attorney General Moorman, Nov. 21, 1979 (reprinted in our Appendix hereto, pp. 1a-20a); Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975); and *Final Report of the American Indian Policy Review Comm.*, 125-138 (1977).

[24] The Northwest Ordinance was made applicable to the Oregon Territory, which included the lands now comprising the Quinault Reservation. 9 Stat. 323, Sec. 14 (1848).

Another early recognition was the Indian Non-intercourse Act of 1790, 1 Stat. 137, 25 U.S.C. § 177. A recent court has held that this Act—

> ". . . imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act . . . ." *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 379 (1st Cir. 1975).

More recently, Congress in the Indian Self-Determination Act, 88 Stat. 2203 (1975), 25 U.S.C. § 450a(b)—

> ". . . declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people . . . ."

Congress referred to the fiduciary relationship in the Indian Claims Commission Act itself. 60 Stat. 1049 (1946), 25 U.S.C. § 70 *et seq.* Section 24 granted jurisdiction to the Court of Claims to hear post-1946 claims, and added this proviso:

> "Provided, however, that nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups." [25]

This trust relationship has been recognized by Congress with respect to these very plaintiffs. The Treaty of Olympia, 12 Stat. 971 (1859), declared in Article VIII that—

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[25] 60 Stat. at 1055-6. This proviso was explained as "indicating that the substantive relations [of long standing] between the United States and the several tribes" were not intended to be altered. *Hearings on H.R. 1198 and 1341 Before House Comm. on Ind. Affairs*, 79th Cong., 1st Sess. 127 (1945).

> "The said tribes and bands acknowledge their dependence on the government of the United States . . . ."

Furthermore, Article IV of the treaty provided that the United States would pay the Indians $25,000 for the cession of their land, but they were not allowed to receive the cash; rather, the money was to "be applied to the use and benefit of the said Indians under the direction of the President . . . ."

2. *Judicial Recognition of the Fiduciary Duty.*

This Court has spoken many times of the Government's trust relationship with the Indians. In *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 17 (1831) (Marshall, C. J.), this Court stated:

> ". . . [The United States' and the Indians'] relation resembles that of a ward to his guardian."

In *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942), the Court said:

> "Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it [the Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

In *United States* v. *Payne*, 264 U.S. 446 (1924), a case involving a Quileute Indian (some of whose descendants are plaintiffs), this Court said:

> "They are an unlettered people, unskilled in the use of language, *Jones* v. *Meehan*, 175 U.S. 1, 10-11, with regard to whom the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable

consideration to discharge its trust with good faith and fairness."

In *Squire* v. *Capoeman*, 351 U.S. 1, 2 (1956), involving a Quinault Indian (and a plaintiff herein), this Court referred to the "Government's role as respondent's trustee and guardian." More recently, in *United States* v. *Mason*, 412 U.S. 391, 398 (1973), involving a breach of trust claim under the Osage Allotment Act, this Court stated:

> "There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians, and that, as such, it is duty bound to exercise great care in administering its trust."

3. *Executive Recognition of the Fiduciary Duty.*

Presidents too have recognized the relationship. Speaking of the Indian Nonintercourse Act of 1790, President George Washington said:

> ". . . you will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians." Quoted in *Seneca Nation* v. *United States*, 173 Ct. Cl. 912, 924 (1965) (emphasis omitted).

In a major message to Congress on Indian affairs in 1970, President Richard Nixon spelled out the basis of the trust relationship:

> "This policy of forced termination [of the trust relationship] is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. *The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government.* Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.
>
> This goal, of course, has never been achieved. *But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.* To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American." [26]

In 1976, President Gerald Ford, addressing an Indian delegation, stated that:

> "The Federal Government has a very unique relationship with you and your people. It is a relationship of a legal trust and a high moral responsibility." [27]

In 1978, President Jimmy Carter stated that:

> "I consider it my solemn duty and obligation as President to see that we fulfill our trusteeship responsibilities within the framework of self-determi-

[26] H. Doc. No. 91-363, reprinted at 116 Cong. Rec. 23258 (July 8, 1970) (emphasis added).

[27] Press release, the White House, July 16, 1976.

nation for American Indians. In particular, I would like to reaffirm my resolve to honor this country's legal and moral responsibilities to American Indians in protecting their land, water and natural resources." [28]

The Government's trust responsibility is well summarized in a lengthy legal analysis from the Solicitor of the Interior Department to the Justice Department, dated November 21, 1978, reprinted in full in the Appendix hereto. The Solicitor concluded (App. 2a) that:

> "1. There is a *legally enforceable* trust obligation owed by the United States Government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements and statutes pertaining to Indians." (Emphasis added).

B. *The Express Fiduciary Duty to These Plaintiffs.*

The Government has a fiduciary relationship with the plaintiffs not only because of the general fiduciary duty to Indians, but expressly because of Section 5 of the General Allotment Act of 1887, 25 U.S.C. § 348, and other statutes, see notes 6 and 7. This fact is not disputed by the Justice Department and need not be further belabored.

C. *The Situation With Respect to Indian Claims Prior to the Indian Claims Commission Act of 1946.*

The foregoing declarations of fiduciary obligation are all very well, but what happens when the Government breaches that obligation to the Indians' detriment? Can the Indians go to court and sue the trustee, the United States, for damages?

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[28] Message from the White House to Delegates of the National Congress of American Indians, August 30, 1978.

Prior to 1946, Indian tribes could not sue the United States, even on the most obvious and commonplace cause of action (*e.g.*, failure to keep treaty promises, or a taking without just compensation), unless they obtained a special jurisdictional act from Congress.[29] This was difficult and time-consuming [30] and, in many cases, when the Indians got an act and went to the Court of Claims, the court construed its jurisdiction under the act so strictly that the Indians either received a small award or were dismissed altogether and had to go back to Congress for another try.[31]

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[29] This was partly because of 12 Stat. 765, § 9 (1863) (which deprived the Court of Claims of jurisdiction over claims arising from Indian treaties) and partly because of the holdings of the Court of Claims. *See, e.g., Choctaw and Chickasaw Nations* v. *United States*, 75 Ct. Cl. 494, 499 (1932); *see also* H.R. Rep. No. 1466, 79th Cong., 1st Sess., 2 n.2 (1945). The legislative history of the Indian Claims Commission Act of 1946 reveals repeated references to the requirement of special jurisdictional acts in order to litigate Indian claims. *See, e.g., Hearings on H.R. 7837 Before the House Comm. on Indian Affairs*, 74th Cong., 1st Sess., 5-9 (1935) (statement of John Collier, Commissioner of Indian Affairs); *Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess., 113-115 (1945) (statement of Harold Ickes, Secretary of the Interior).

[30] An example of delay is detailed in Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 Geo. L. J. 511 (1966). The Turtle Mountain Chippewas tried for many years to get a special jurisdictional act after being forced into a cession for an extremely unfair price in 1904. In 1928 the Senate finally approved a bill, but the House did not concur until 1934. President Roosevelt vetoed the bill in 1934, and then vetoed a revised bill. Further efforts were never fully successful and, finally, the claim was filed under the Indian Claims Commission Act of 1946. As of September 1979, the case is still being litigated, having had several trials and appeals. Another trial is pending on one phase of the case, and an appeal is pending on another.

[31] Between 1881 (the year of the first claim) and 1946, almost 200 claims were filed in the Court of Claims under special acts. Only 29 received awards. The bulk of the rest were dismissed on technicalities. *Final Report of the Indian Claims Commission* 3

Most of the pre-1946 claims were land claims—*i.e.*, claims for damages where land was taken without any payment [32] or for inadequate payment,[33] and often the court would refer to breach of the fiduciary duty as a basis for recovery.[34] A few claims were for mismanagement of assets (breach of trust),[35] and at least one was for breach of trust in turning over tribal funds to a tribal government known to be corrupt.[36] However, all of these claims required a special jurisdictional act, until the Indian Claims Commission Act was passed.[37]

Equitable relief (*i.e.*, injunction and declaratory judgment) was available in federal district courts to enforce the trust responsibility, at least in certain situations.[38]

(1978); *see also Wilkinson*, note 30 *supra*, showing a rate of recovery on Indian claims of only 7 percent of the amounts claimed, not even counting zero recovery cases.

[32] *See, e.g., Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308 (1930).

[33] *See, e.g., Klamath and Modoc Tribes* v. *United States*, 304 U.S. 119 (1938).

[34] *See, e.g., United States* v. *Mille Lac Band*, 229 U.S. 498, 509-10 (1913); *United States* v. *Creek Nation*, 295 U.S. 103, 109-10 (1935).

[35] *See, e.g., Navajo Tribe* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966) (mismanagement of mineral assets) (suit based in part on special jurisdictional act); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 22 (1944) (mismanagement of timber).

[36] *Seminole Nation* v. *United States*, 316 U.S. 286 (1942).

[37] It is interesting to note that by the time the Indian Claims Commission expired in 1978, it had awarded some $818,000,000 to Indian tribes, mostly in compensation for pre-1946 land claims. *Final Report of the Indian Claims Commission* 125 (1978). That figure is about the same as the estimated $800,000,000 that the United States paid the Indians through various treaties and agreements for 90 percent of the public domain. *Id.* at 5. The combined total is less than the cost of two Trident submarines. Cong. Rec. S12599 (Sep. 14, 1979).

[38] In *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), this Court enjoined the Secretary of the Interior from disposing of the tribe's land under the general public land laws. *See also Cramer*

However, this relief is generally prospective only, and obviously not capable of remedying irreversible wrongs such as failing to obtain a fair price for timber. For the latter, only money damages will make the Indians whole, and for this a special jurisdictional act was necessary prior to 1946.

In summary, when Congress began to consider the Indian Claims Commission Act in 1945 [39] the Government's fiduciary duty to Indians was well recognized, but the Tucker Act was inapplicable to Indians, so that Indian damage claims required special jurisdictional acts.

D. *The Legislative History of Section 24 of the Indian Claims Commission Act (Now 28 U.S.C. § 1505).*

In 1946 Congress passed the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* The purpose was twofold: (1) to give tribes their day in court on old claims previously barred, and (2) to remove the bar as to future claims. The second purpose was accomplished in Section 24 which is now codified as 28 U.S.C. § 1505, and is quoted at p. 13-14 above.

The legislative history of Section 24 clearly manifests Congress' desire to end the need for special jurisdictional acts for Indian breach of trust claims. Congressman (now Senator) Henry M. Jackson, the principal sponsor of the bill in the House, stated:

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v. *United States*, 261 U.S. 219 (1923). However, in 1941 when the plaintiffs in this case (or their predecessors) sought to enjoin the Secretary from mismanaging their timber, the Ninth Circuit Court of Appeals dismissed the case as one against the sovereign who had not waived immunity. *United States* v. *Eastman*, 118 F.2d 421 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941).

[39] Actually, Congress had been considering the Indian Claims Commission concept since at least 1928. *See Final Report of Indian Claims Commission* 3 (1978). However, the main legislative history took place in 1945-1946.

> "[S]ection 24 of the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims, *so it will never again be necessary to pass special Indian jurisdictional acts* in order to permit the Indians to secure a court adjudication on *any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future.*" [40]

Congress was also aware of the varied nature of Indian claims, recognizing that: "All sorts of agreements have been made concerning the use and disposition of these [Indian] funds and promising protection of the lands retained by the Indians." [41] Indeed, in describing the nature of Indian claims, Congress specifically referred to a timber mismanagement claim of the Menominee Indians for which a special jurisdictional act had been enacted, and which had been found by the court to be a valid claim.[42] Congress observed:

> "If we fail to meet these obligations by denying access to the courts *when trust funds have been improperly dissipated or other fiduciary duties have been violated*, we compromise the national honor of the United States." [43]

Congress recognized that unless Indians were given the right to sue the Government for mismanagement of their trust funds and property, there would continue to be

> ". . . encourage[ment of] bureaucratic disregard of the rights of Indian citizens by a small minority of

[40] 92 Cong. Rec. 5313 (1946) (emphasis added). *See also Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess., 148-149 (1945).

[41] H.R. Rep. No. 1466, 79th Cong., 1st Sess., 4 (1945).

[42] *Id.*

[43] *Id.*

> governmental officials who are comforted by the thought that there is no judicial redress available to the victims of their maladministration . . . ." [44]

Congressman Jackson stressed the importance of this fact as a reason to provide Indians with access to the courts:

> *"The Interior Department itself has suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability . . . .*
>
> [L]et us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed." [45]

Felix S. Cohen, then Associate Solicitor for the Interior Department and an acknowledged expert on Indian law, submitted comments to Congress on behalf of the Interior Department. Those comments with respect to Section 24 stated:

> "[*I*]*t may be expected that future transactions with the Indians will at times give rise to additional claims*, the same as in the case of other parties who believe that they have been dealt with unjustly by the Government. The new section [24] here proposed would correct this situation by permitting the Court of Claims to take cognizance of Indian tribal claims accruing subsequent to the enactment of the bill." [46]

The House report summarized the purpose of the Indian Claims Commission Act very succinctly as follows:

[44] *Id.*

[45] 92 Cong. Rec. 5312 (1946) (emphasis added).

[46] *Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess., 130 (1945) (emphasis added).

> "[T]he statutory prohibition against litigation in the Court of Claims growing out of agreements with Indian tribes would be lifted and the Indian would henceforth have the same right as his white or black neighbor to secure a full and free hearing in the Court of Claims, or any other appropriate tribunal, *on any controversy with the Federal Government that may arise in the future.*" [47]

The Justice Department (Br. 32) contends that Congress never intended in 1946 to create a cause of action for breach of trust. We agree that no breach of trust claim had been brought by any tribe prior to 1946 without a special jurisdictional act. However, it is quite clear that Congress in the language quoted above was saying that from 1946 on, the Government, as trustee, must account for its handling of Indian trust property, which means it must pay damages if it has breached its fiduciary duties to the detriment of the Indians.[48] We discuss this point more fully in Section III below.

Thus, Congress in passing Section 24 of the Indian Claims Commission Act clearly intended to give "Indian tribes, bands, and other identifiable groups of American Indians",[49] from 1946 onward, the right to sue the

[47] H.R. Rep. No. 1466, 79th Cong. 1st Sess., 3 (1946) (emphasis added).

[48] We note that the Court of Claims has construed the 1946 legislative history narrowly, and limited the right to an accounting to instances where the Indians have first proven actual wrongdoing by the Government. In other words, even under 28 U.S.C. § 1505 the Indians have no right to a general accounting. *Klamath and Modoc Tribes* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966). The Court of Claims has also held that the United States does not bear the usual trustee's duty to pay interest on damages for breach of trust, unless a statute specifically so requires. *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976).

[49] The Justice Department may argue that the 1,465 individual allottees who are plaintiffs here do not comprise a "tribe, band, or

United States in the Court of Claims to the same extent as other citizens, and it intended that damage claims involving mismanagement of trust funds and property were to be within the ambit of the court's jurisdiction. Indeed, if such cases were not within the court's jurisdiction, very few damage claims could be brought today, since as Congress well knew, all of the old treaty claims have been or will soon be resolved, and the principal activity of the Government since 1946 capable of generating claims has been the performance of its role as manager of trust property.[50]

E. *The Justice Department's Argument Regarding the Purpose of 28 U.S.C. § 1505 is Specious.*

The Justice Department argues in a long footnote (Br. 12-15 n. 5) that the purpose of the Indian Claims Commission Act was simply to give Indians the same right to sue the United States as non-Indians. Therefore, Justice argues, Section 1505 is not in itself a waiver

identifiable group" so as to be eligible to file a claim under 28 U.S.C. § 1505. This is not correct. The allottees have, in effect, *already* been treated by both the Government itself and the Court of Claims as an "identifiable group" of Indians. The Government so treated them when it issued allotments on the Quinault Reservation to the ancestors of the plaintiffs pursuant to the Treaty of Olympia, the Executive Order of 1873, the General Allotment Act, and the Quinault Allotment Act of 1911 (see p. 3 *supra*), treating them as one group. The Court of Claims similarly has effectively found the allottees to be an "identifiable group" by virtue of its class action decision in this case which recognized the facts of the allottees' contiguous ownership of allotments on the Quinault Reservation and the Government's common management thereof. *See Quinault Allottee Ass'n* v. *United States*, 453 F.2d 1272, 1276 (Ct. Cl. 1972). *See also Coast Indian Community* v. *United States*, 550 F.2d 639 (Ct. Cl. 1977); *Thompson* v. *United States*, 122 Ct. Cl. 348, *cert. denied*, 344 U.S. 856 (1952). In any event, as Section III of our argument shows, the individual allottees can file claims under the Tucker Act, as the Court of Claims held below.

[50] The Court of Claims recognized that breach of trust claims were expected by Congress in 1946 to be perhaps the "main grist" of the courts. Pet. App. 11a n.16.

of sovereign immunity because the Tucker Act, which Section 1505 tracks, is not in itself a waiver of sovereign immunity.

We agree, of course, that the Tucker Act is not in itself a waiver of sovereign immunity. This has long been the law. But Section 1505 *is* a waiver of sovereign immunity, and the waiver was the very purpose for its passage. Until the Indian Claims Commission Act was passed, Indians were barred by sovereign immunity from suing the United States for damages. Section 1505 lifted this bar for post-1946 claims, provided only that the Indians have a claim which arises "under the Constitution, laws or treaties of the United States, or Executive orders of the President . . . ." In this respect Section 1505 gives Indian tribes and groups something that others do not have: the right to sue the United States for damages on claims arising from the laws or treaties of the United States, without any necessity that such laws or treaties imply within themselves a waiver of sovereign immunity. The waiver is directly granted by Section 1505. Or, put another way, the legislative history of Section 1505 supplies what *Testan* holds is missing from the Tucker Act.

To hold that these Indians must return to Congress to seek another waiver of sovereign immunity would place them in the same position as if Congress had never passed Section 1505. Justice's argument can be accepted only if the legislative history of Section 1505 is ignored.

III. These Breach of Trust Claims Can Be Brought Under the Tucker Act, 28 U.S.C. § 1491, Because There Are Independent Sources for Waiver of Sovereign Immunity.

We have shown in Section II above that when Congress passed the Indian Claims Commission Act, it not only lifted the previous barrier against Indian claims, but in doing so made clear that it intended claims such

as the instant one to be cognizable after 1946. We believe this is conclusive of this case.

However, the Justice Department (Br. 12) argues that because of *Testan*, plaintiffs still must show that the statute under which the trust relationship arose (the General Allotment Act) expressly or impliedly subjects the Government to suit for damages in event of breach of trust. We agree that a waiver of sovereign immunity must be shown, and we believe it is shown by the General Allotment Act. However, it need not be shown by the General Allotment Act; it may be shown by another statute (such as 28 U.S.C. § 1505, discussed in Section II), or by any other proper source, as we discuss in this Section. Consequently, these plaintiffs' claims are cognizable under the Tucker Act pursuant to waiver impliedly granted by the General Allotment Act, and/or the other sources discussed.

The Tucker Act, 28 U.S.C. § 1491, provides:

> "The Court of Claims shall have jurisdiction to render judgment on any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Of course, *Testan* teaches that the Tucker Act itself is not a waiver of sovereign immunity, and the waiver, if one exists, must be found in independent sources. We believe that the necessary waiver in the instant case can be found by implication in independent sources:

a. The express trust created by statute implies a waiver of immunity.

b. The statutes spelling out management duties of the trustee imply a waiver of immunity from suit for damages for breach of those duties.

c. The facts of this case make out a contract, and any contract with the Government grants by implication a waiver of immunity.

d. The Government's mismanagement of trust assets falls into the "money improperly exacted or retained" class, which automatically receives a waiver of immunity.

We will discuss these sources in order.

A. *When Congress Intentionally Establishes an Express Trust Relationship with Indians, It Impliedly Subjects the Government to Suit for Damages Under the Tucker Act in the Event the Government Breaches Its Trust Duties.*

We submit that when Congress intentionally creates an express trust with an Indian or Indian tribe (or with anyone else for that matter), it creates an undertaking that impliedly includes as one of its incidents the liability to pay damages in the event of breach of the terms of the trust. The right to sue for damages is a substantive right impliedly conferred by the statute creating the trust, and is therefore cognizable under the Tucker Act. The plaintiffs here are all beneficiaries of express trusts specifically naming them, see notes 6 and 7 above.

We find the express trust situation difficult to distinguish from the express contract situation. In the case of an express contract, there is no need for the contract to spell out that if the United States breaches its undertaking it can be made to pay damages, because that is one of the fundamental elements of the contract itself, so fundamental it goes without saying. Without such liability the contract is not a contract. The courts have never, to our knowledge, questioned their jurdisdiction under the Tucker Act to award damages against the United States for breach of contract simply because the contract does not expressly spell out a substantive right

of damages for breach,[51] nor did *Testan* make any such suggestion.

The reason, we submit, is that when the Government contracts to do something, that constitutes a distinct, "anchored" obligation [52] to a distinct contracting party, and the fears apparently implicit in *Testan* of creating claims of unknown scope for unknown persons based merely upon congressional policies do not apply. Therefore, the substantive right to sue the United States for damages for breach of contract (*i.e.*, the waiver of sovereign immunity) is implicit in every contract with the United States.[53]

We believe the case of an express trust is indistinguishable. In such a case the United States has made a distinct undertaking to a distinct beneficiary to take care of distinct trust property, very similar to its undertaking when it enters into a contract. It is fundamental to the very trust relationship itself that the beneficiary be able to sue the Government for damages if the Government breaches its trust undertaking.[54] This substantive right does not have to be spelled out in the trust

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[51] None of the many Government contracts of which we are aware expressly waives sovereign immunity in event of breach.

[52] The Justice Department's brief frequently repeats the phrase "unanchored judge-created principles of fiduciary law." Br. 7 n.2, 10, 11, 30, 31, 33. We do not see the relevance.

[53] Of course, the Tucker Act expressly allows breach of contract claims, but as *Testan* teaches, that merely grants the forum, not the substantive right. Many contract claims are brought under the Tucker Act to recover damages other than for breach of promise to pay money (*e.g.*, delay damages), so it would not be correct to say that jurisdiction over contract claims, like jurisdiction over Fifth Amendment claims, is simply a matter of the contract's self-executing aspects. *See Jacobs* v. *United States*, 290 U.S. 13 (1933); *see also Testan*, 424 U.S. at 401.

[54] *See Restatement (Second) of Trusts* § 25 (1959); "[N]o trust is created unless [the settlor] manifests an intention to impose duties which are enforceable in the courts." *See also id.* at § 205.

instrument, any more than it does in a contract. It is implied, just as it is in a contract.

B. *Statutes Specifying the Government's Management Duties Imply a Right to Sue for Damages Under the Tucker Act.*

Even though the express trust relationship established by the General Allotment Act should be sufficient to support jurisdiction under 28 U.S.C. §§ 1491 and 1505, as the Court of Claims found, we would note that the plaintiffs are also suing under other statutes which, in themselves (especially in combination with the trust relationship) could support jurisdiction. We agree entirely with the Court of Claims that these statutes and regulations "furnish statutory directives—substantive rules of conduct—which help to determine the obligations and undertakings of the Federal Government as trustee" (Pet. App. 13a), but we also believe that these statutes furnish an independent implied waiver of sovereign immunity. We will, therefore, briefly summarize the principal ones in relation to our claims.

1. *25 U.S.C. § 466.*

One of the plaintiffs' major claims is that the Government failed to manage their timber in compliance with 25 U.S.C. § 466. This statute is part of the Indian Reorganization Act of 1934, which provides for the management of Indian forests on a sustained yield basis. In enacting this requirement, Congress heard testimony from Commissioner of Indian Affairs John Collier that:

> "[T]here must be a constructive handling of Indian timber. We have got to stop the slaughtering of Indian timber lands, to operate them on a perpetual yield basis *and the bill expressly directs that this principle of conservation shall be applied throughout.*" [55]

Collier pointed out:

> "The declaration that sustained yield shall be practiced in the forests is very important. *It is a direction.*" [56]

He went on to discuss an earlier attempt by Congress to apply this principle to the timberlands of the Menominee Tribe. Unfortunately, the principle set forth

> ". . . was not followed by the Department. Much of their timber was devastated, *and, as a result, they have a claim against the Government, an assertable and collectable claim,* that they were protected by a specific direction from Congress that the timber should be operated on a perpetual yield basis. The other tribes are entitled to similar protection." [57]

The regulations of the Interior Department promulgated pursuant to 25 U.S.C. § 466 embellished the meaning of "sustained yield." The 1949 regulations,[58] which are essentially unchanged today,[59] required preserving Indian forest lands in a perpetually productive state, no clear-cutting of large contiguous areas, making ade-

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[55] *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs,* 73d Cong., 2d Sess., Pt. 2, 35 (1934) (emphasis added).

[56] *Id.*; Pt. 4, at 131 (emphasis added).

[57] *Id.* (emphasis added). The Menominees later did indeed prevail upon their claim that the Government failed to manage their forest on a sustained yield basis. *Menominee Tribe* v. *United States,* 117 Ct. Cl. 442 (1950).

[58] Plaintiffs' Exhibit DT 3.3-2.1. The first regulations under this statute were promulgated in 1936 (DT 3.3-1.3) and were incorporated essentially verbatim into the 1949 C.F.R., which was in effect when the current and just-completed logging contracts at Quinault were negotiated between the BIA and the contractors.

[59] *See* 25 C.F.R. Pt. 141 (1979).

quate provision for new growth when mature timber is removed, regulation of cutting so as to have continuous production and a perpetual forest business, etc.[60]

Plaintiffs believe that the evidence in this case will show that the Government violated the foregoing statute and regulations, causing direct and substantial loss to the plaintiffs, in that in some areas on the Reservation there is no timber growing even though logging was completed many years or even decades ago.

Plaintiffs submit that 25 U.S.C. § 466 implicitly permits the Court of Claims to award compensation to them for their losses flowing from violations of 25 U.S.C. § 466 and the regulations issued pursuant thereto.

2. *25 U.S.C. §§ 406 and 407.*

The United States was authorized as trustee to sell Indian timber from allotted and unallotted trust lands by virtue of the Act of June 25, 1910, 25 U.S.C. §§ 406 and 407.[61] Detailed regulations implementing these statutes first appeared in 1911, recognizing that the BIA's duty under the 1910 Act entailed:

> ". . . so managing the Indian forests as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." [62]

The 1911 regulations were revised from time to time and today appear in Title 25 of the Code of Federal

[60] 25 C.F.R. §§ 61.1 and 61.3 (1949) (DT 3.3-2.1).

[61] When Congress passed the Act, it did so partly in recognition of the fact that "in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment." H.R. Rep. No. 1135, 61st Cong., 2d Sess., 3 (1910).

[62] Plaintiffs' Exhibit DT 3.3-1.1, at 4. Even the Government officers admit that they were required to obtain fair market value for the plaintiffs' timber.

Regulations.[63] Although there are detailed regulations regarding the Bureau of Indian Affairs' forest management included within its own Indian Affairs Manual,[64] the overall regulations still appear annually in 25 C.F.R., covering essentially the same details as the 1911 regulations.

Plaintiffs believe that the evidence in this case will show that the Government violated the foregoing statutes and regulations by, for example:

(a) Failing to obtain fair market value for the plaintiffs' timber through pricing and scaling practices which did not meet the Government's own regulations;

(b) Failing to obtain any compensation at all for some of the plaintiffs' merchantable timber, due to poor scaling practices which failed to meet the Government's own regulations; and

(c) Charging improper and excessive costs against the plaintiffs' stumpage payments, due in part to nonadherence to the Government's own regulations.

Plaintiffs submit that Section 406 and 407 implicitly permit the Court of Claims to award compensation for losses flowing from violations of the implied directive of those statutes and the regulations issued pursuant thereto, that the Indians shall be paid fair market value for their timber.

3. *25 U.S.C. § 413.*

The Government was authorized by virtue of the Act of February 14, 1920, 41 Stat. 415, 25 U.S.C. § 413, to deduct reasonable fees from Indian timber sale proceeds to cover the cost of the management and sale of the Indians' timber. Following the congressional authoriza-

[63] 25 C.F.R. Pt. 141 (1979).

[64] Plaintiffs' Exhibit DT 19.4-1.1 and 19.4-1.2.

tion to charge "reasonable fees," the Interior Department set forth in its regulations the rate of such fees and what they were intended to cover. The regulations first appeared in 1924, were included in the 1927 [65] and 1936 [66] revisions, and stated as follows in 25 C.F.R. § 61.25 (1949): [67]

> "In all sales of timber from either allotted or unallotted land a sufficient deduction will be made from the gross proceeds to cover the cost of examining, supervising, advertising, collecting, disbursing, accounting, marketing, scaling, caring for slash, and protecting from fire the timber and young growth left standing on the land being logged or upon adjacent land . . . ."

Plaintiffs believe that the evidence in this case will show that the administrative fees deducted from their timber sales proceeds have not in fact been reasonable as Congress directed, *but have grossly exceeded the BIA's own stated costs* (see note 76 below). Moreover, some of the items included as costs by the Government are improper or duplicative of costs which the loggers were supposed to bear.

Plaintiffs submit that Section 413 implicitly permits the Court of Claims to refund to them those fees which have not been earned under that statute and the regulations issued thereunder.

4. *25 U.S.C. §§ 318a and 323 through 325.*

Under the Act of February 5, 1948, 62 Stat. 17, the relevant portions of which are codified in 25 U.S.C. §§ 323 through 325, Congress authorized the Secretary of the Interior to grant rights-of-way for all purposes

[65] Plaintiffs' Exhibit DT 3.3-15.

[66] Plaintiffs' Exhibit DT 3.3-1.3.

[67] Plaintiffs' Exhibit DT 3.3-2.1.

across Indian trust land, provided that he paid such compensation as he deemed just. Pursuant to this statute, regulations have been promulgated requiring the issuance of revocable permits for logging roads upon fair and adequate terms,[68] fair compensation to the Indian landowner therefor,[69] and restoration of right-of-way land to original condition as nearly as possible.[70]

Plaintiffs believe that the evidence in this case will show that the Government violated these statutes and regulations by:

(a) Failing to obtain fair market value in selling certain rights-of-way; [71]

(b) Charging the allottees for road maintenance costs on public or BIA roads; and

(c) Failing to require the restoration of certain rights-of-way to original condition.

Plaintiffs submit that Sections 318a and 323 through 325 implicitly permit the Court of Claims to award compensation to them for their losses flowing from violations of those statutes and regulations issued thereunder.

5. *25 U.S.C. § 162a.*

Under the Act of June 24, 1938, 52 Stat. 1037, 25 U.S.C. § 162a,[72] the Secretary of the Interior was given authority to invest tribal and individual Indian funds in

[68] *See, e.g.*, 25 C.F.R. § 256.66 (1949) (DT 3.3-2.1).

[69] *See, e.g.*, 25 C.F.R. §§ 256.69, 256.75, and 256.82 (1949) (DT 3.3-2.1); 25 C.F.R. §§ 161.12 and 161.13 (1979).

[70] *See, e.g.*, 25 C.F.R. § 161.7(d) (1958) (DT 3.3-2.2); 25 C.F.R. § 161.5(d) (1979).

[71] *See Coast Indian Community* v. *United States*, 550 F.2d 639, 653 (Ct. Cl. 1977). The evidence may in fact reveal that in some cases roads were effectively taken for public use without payment of just compensation in violation of the Fifth Amendment.

[72] This Act amended the Act of May 25, 1918, 40 Stat. 591.

banks, bonds, notes or other public debt obligations of the United States if deemed advisable and for the best interest of the Indians.[73] The courts have said the Government is liable under this statute for failure to obtain going rates of interest on invested trust funds. *Cheyenne-Arapaho Tribes* v. *United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975); *Manchester Band of Pomo Indians* v. *United States*, 363 F. Supp. 1238, 1243-44 (N.D. Cal. 1973).

Plaintiffs believe that the evidence in this case will show that the Government paid no interest on some of plaintiffs' funds, and an unreasonably low rate of interest on other of plaintiffs' funds.

Plaintiffs submit that Section 162a implicitly permits the Court of Claims to award compensation to them for their losses flowing from violations of that statute and the regulations issued thereunder.[74]

C. *The Express Trusts Involved Here Are Contracts, and Breach Thereof Creates a Claim Traditionally Under the Tucker Act.*

We believe that the facts of the trust relationship in this case meet the requirements of an implied contract under the Tucker Act.[75] Obviously, an express right to sue the Government need not be present in an implied contract because there is no actual contract underlying the claim. In such cases, the plaintiff need only prove that a contract was inferred "from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore and Ohio R.R.* v. *United States*, 261 U.S. 592, 597 (1923); *Cities Service Gas Co.* v. *United States*, 500 F.2d 448, 451-452 (Ct.Cl. 1974).

[73] The Act of April 30, 1934, 48 Stat. 647, 25 U.S.C. § 372, amended the Act of June 25, 1910, 36 Stat. 855, covering the sale of Indian timber, to authorize the BIA to deposit tribal and individual Indian monies coming into its hands in banks.

[74] Where "the Government has the citizen's money in its pocket," a suit to recover such money can clearly be brought. *Eastport Steamship Corp.* v. *United States*, 372 F.2d at 1007-08.

[75] This, of course, refers to implied-in-fact as opposed to implied-in-law contracts. *See United States* v. *Minnesota Mut. Inv. Co.*, 271 U.S. 212, 217 (1926).

Under this test, there should be no question about the Indians' right to sue the Government in this case. As indicated previously, the Government, pursuant to its own statutes, regulations, and logging contract terms, has undertaken every detailed aspect of the management and sale of the Indians' timber since even before logging first began on the Quinault Reservation. In return for these promised services, it has charged the Indians an administrative fee so large that it substantially exceeds the cost of the services.[76] The Indians' attack on the legitimacy of those fees (as opposed to the reasonableness) was rejected by the Court of Claims. *Quinault Allottee Ass'n* v. *United States*, 485 F.2d 1391 (Ct.Cl. 1973), *cert. denied*, 416 U.S. 961 (1974). If the fees are legally authorized and the promised services are not performed properly (or at all in some cases), there should clearly be an implied contract with a concomitant right to sue on the part of the Indians. The Justice Department seems to concede this (Br. 16 n.6), at least to the extent of recovery of the excessive fees.

We believe there is an implied contract in another respect. The terms of the Treaty of Olympia provided that the Indians would cede their aboriginal lands to

[76] The Government's own records show that on a cumulative basis as of Fiscal Year 1971, it had taken in some $3.6 million in fees in return for $2.9 million worth of management services on the Quinault Reservation. Plaintiffs' Exhibit DT 17.6-15. We believe that our evidence will show that this disparity has grown since 1971 and that some of the items included as expenditures are improper.

the United States in return for the trust relationship, and a small sum of money later held to be grossly inadequate,[77] and the establishment of a reservation which could be allotted to individuals.[78] The allotments made on the Quinault Reservation pursuant to the General Allotment Act and the Quinault Allotment Act thus were made in fulfillment of the treaty promises.

As the Justice Department pointed out in its brief (Br. 22), the whole intent of this statutory scheme was to educate and train the Indians to become self-sufficient in terms of the white community. As part of this scheme, the trustee was required to manage the Indians' land and timber and has done so since even before all of the allotments were made on the Quinault Reservation. Obviously, the trusteeship and the allotment scheme were part of the consideration in return for the Indians' cession of their aboriginal homelands.[79]

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[77] Under Art. IV of the Treaty of Olympia, 12 Stat. 971, the Quinaults and Quileutes were promised $25,000, whereas the land they ceded was worth $317,000. *See* 10 Ind. Cl. Comm. at 417 (1962).

[78] 12 Stat. 971, Art. VI. The treaty said that the President could assign lots to Indians who were "willing to avail themselves of the privilege, and will locate on the same as a permanent home."

[79] *See* President Nixon's Message to Congress, note 22, *supra*. *See also Cherokee Nation* v. *Georgia*, 30 U.S. 1, 58-59 (1831) (concurring opinions of Thompson and Story, JJ.): ("The treaties made with this [Cherokee] nation purport to secure to it certain rights. These are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory."); *Morrow* v. *United States*, 243 Fed. 854, 857 (8th Cir. 1917), holding that where Indians consented to relinquish their lands and accept trust allotments, there was "a valid contract" between the Government and the Indians; and *United States* v. *Ferry County*, 24 F. Supp. 399, 400 (E.D. Wash. 1938) ("this [allotment] is an express trust for valuable consideration, to the faithful performance of which the United States was legally committed.")

For these reasons there was an implied contract that the Government would manage the Indians' trust timber, and if the Government did not do so adequately, there is an implied right to sue for damages under the Tucker Act, just as for breach of any other implied contract.

D. *The Government's Mismanagement of Trust Assets Is Akin to "Money Improperly Exacted or Retained," and Therefore Directly Creates a Claim Cognizable Under the Tucker Act.*

In *Testan*, this Court indicated that a suit "for money improperly exacted or retained" would be directly cognizable under the Tucker Act, without the necessity of finding an independent waiver of sovereign immunity. 424 U.S. at 401. This is a reference to the first class of cases mentioned in *Eastport*, 372 F.2d at 1007, where the plaintiff "seeks return of all or part of that sum," and plaintiff need only allege violation of the Constitution, a statute, or a regulation. *Id.*

When through lack of prudent care the United States, as trustee with possession and control of an Indian's land, sells it for less than fair value, or allows waste, we believe that this must give rise to a claim tantamount to one for "money improperly exacted or retained." The claim is thereupon cognizable under the Tucker Act without more.

E. *The Justice Department's Argument that the General Allotment Act Cannot be Construed to Subject the Government to a Breach of Trust Suit is Specious.*

The Justice Department devotes much of its argument (Br. 21-29) to the proposition that the General Allotment Act was merely a passive trust under which the Government undertook no management responsibilities, and, thus, that the Act cannot subject the Government

to suit for damages for breach of trust. This argument, however, is irrelevant since the trust relationship itself implicitly grants the necessary consent to suit.[80] Moreover, this argument ignores the reality of the Government's comprehensive and exclusive management activities (*i.e.*, the way the *Interior* Department has construed the Act), and the legislative histories of the other relevant statutes which must be read together (*in pari materia*) with the General Allotment Act as an expression of legislative intent.[81]

As the Justice Department acknowledges (Br. 22), the policy behind the General Allotment Act was to give individual homesteads to Indians to enable them to become self-supporting and to assimilate them into the larger society. The trust and the restriction upon alienation of the land were designed to protect the Indians and assist them in achieving this goal.[82] In *United States* v. *Payne*, 264 U.S. 446 (1924), dealing specifically with the Quinault Reservation, this Court held that timberlands were also to be allotted under the General Allotment Act to achieve the congressional purpose.

[80] The Justice Department seems to suggest (Br. 24) that the scope of the Government's trust responsibility does not extend to "broad management responsibilities." However, this is certainly contrary to what the Secretary of the Interior has understood and acted upon since he began having the Quinault allotments logged in 1920. In any case, the scope of the Government's management responsibilities is a question on the merits to be established at trial; it does not bear upon whether the Government has consented to be sued for breach of trust.

[81] Br. at 21-29. Justice's "analysis" of the legislative history of the General Allotment Act and related legislation conveniently stops before the passage of the Indian Claims Commission Act.

[82] The Justice Department (Br. 24-25) argues that the only purpose of the trust was to prevent alienation and taxation. As the Court of Claims said, "But that is not what the statute says, nor is it the way in which the Act has been administered." Pet. App. 6a n.11.

When Congress passed the Act of June 25, 1910, 36 Stat. 857, 25 U.S.C. §§ 406 and 407, authorizing the Secretary of the Interior to sell Indian trust timber, it did so partly in recognition of the fact that "in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment." [83] In other words, Congress saw the 1910 Act as necessary to further the purpose of the General Allotment Act of aiding and "civilizing" the Indian.[84] This Court relied heavily upon this same purpose in *Squire* v. *Capoeman*, 351 U.S. 1 (1956) (involving a plaintiff herein), in holding that the Indian's timber sale proceeds were exempt from federal income taxes. This Court reasoned that unless the Indian received the full, untaxed income from his timber, which was all his land was useful for, that income would not "be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence." *Id.* at 9-10.

Immediately after the passage of the 1910 Act, the Interior Department promulgated detailed regulations governing the management and sale of Indian timber.[85]

[83] H.R. Rep. No. 1135, 61st Cong. 2d Sess., 3 (1910). The Justice Department says that the 1910 Act failed to distinguish between management of Indian lands under a trust patent and those held under a patent with a mere restriction on alienation, and that this is why the Court of Claims did not rely upon the Act in its opinion. This is false. The Government manages the trust and restricted lands as if they were the same. *See* 25 C.F.R. § 141.1(b) (1979). The court relied upon the trust established in the General Allotment Act because that is sufficient for jurisdiction under *Testan* and *Eastport*.

[84] In the Act of March 4, 1911, 36 Stat. 1345 ("Quinault Allotment Act"), Congress further specified the Indians it intended to receive trust allotments on the Quinault Reservation. This again manifests the continuing nature of Congress' intent in effectuating its Indian policy under the General Allotment Act.

[85] Plaintiffs' Exhibit DT 3.3-1.1.

In 1920 (coinciding with the beginning of logging on the Quinault Reservation), Congress decided that the Government should be compensated for its services in managing and selling the Indians' timber and passed a statute authorizing the involuntary deduction by the Government from the Indians' timber sale proceeds of a reasonable fee to cover the cost of these services.[86] The Interior Department then promulgated new regulations governing every detailed aspect of the management and sale of Indian timber and specifying what the fee was to cover.[87] This again demonstrates not only the pervasiveness of the Government's management activities with respect to the Indians' timber, but also Congress' recognition of this fact and its decision that the Government should be paid for its services.

In 1934, Congress passed the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, which essentially recognized the failure of the allotment policy and provided for the restoration and protection of Indian trust land. Though abandoning the allotment policy, Congress nevertheless reaffirmed and strengthened the Government's management role with respect to Indian trust property. In Section 6 of the Act (now 25 U.S.C. § 466), Congress required that Indian forests be managed on a sustained yield basis. This was referred to as a directive.[88]

Under the long-established policies that statutes passed for the benefit of Indians are to be "liberally construed, doubtful expressions being resolved in favor of the In-

[86] Act of February 14, 1920, 41 Stat. 415, 25 U.S.C. § 413.

[87] Plaintiffs' Exhibit DT 3.3-15. The fee in the large Quinault timber sale contracts has been changed from time to time, but has ranged from 6 to 10 percent.

[88] See quotation by Commissioner of Indian Affairs John Collier at page 33, *supra*.

dians," [89] and that such statutes are to be construed *in pari materia*,[90] it should be clear that the subsequent acts of Congress dealing with the Government's trust responsibilities are all part of a continuous purpose on the part of Congress. The *in pari materia* rule is particularly appropriate here since it is typically used in the case of multiple statutes dealing with the same legislative purpose in order to determine the legislative intent behind the earlier statute(s). *See NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Dir. Office of Workers Compensation Programs* v. *Nat'l Mines Corp.*, 554 F.2d 1267, 1275 (4th Cir. 1977). In fact, this Court has already construed the General Allotment Act *in pari materia* with other statutes, saying that they—

> ". . . constitute part of a single system evidencing a continuous purpose on the part of Congress . . . directed toward the benefit and protection of the Indians . . . ." [91]

Similarly, the Ninth Circuit, quoting *Jackson*, construed the General Allotment Act *in pari materia* with subsequent Indian statutes, including the Indian Reorganization Act. *Stevens* v. *Comm'r*, *supra*, 452 F.2d at 746.

[89] *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976) (citations omitted). This Court has relied upon this canon on scores of occasions beginning with *Worcester* v. *Georgia*, 31 U.S. 515, 582 (1832), and it is particularly appropriate with respect to the statutes in question here since all of them were passed ostensibly to benefit the Indians.

[90] *See, e.g., Menominee Tribe* v. *United States*, 391 U.S. 404, 411 (1968); *Stevens* v. *Comm'r*, 452 F.2d 741, 746 (9th Cir. 1971); *Kirkwood* v. *Arenas*, 243 F.2d 863, 866-867 (9th Cir. 1957).

[91] *United States* v. *Jackson*, 280 U.S. 183, 196 (1930). One of the statutes referred to by the Court, even though it was not directly involved, was the Act of June 25, 1910, which, *inter alia*, authorized the sale of Indian timber. The Court noted with approval the Interior Department's construction of that Act together with the General Allotment Act in connection with its determination of heirs under the latter Act.

Thus, it should be beyond dispute today that the General Allotment Act and subsequent statutes, up to and including the Indian Claims Commission Act, evidencing the "continuing purpose on the part of Congress" to aid and protect the Indians, must be construed together as a declaration of legislative intent. Since that intent included provisions for the sale and sustained yield management of Indian timber, Indians should be entitled to sue under the Tucker Act when the Government has mismanaged these functions.

IV. This Court, the Court of Claims, and Two Federal District Courts Have Expressly or Tacitly Upheld Jurisdiction Over Breach of Trust Damage Claims Under 28 U.S.C. §§ 1491 and 1505.

A. *Suits by Individual Indians Under the Tucker Act.*

Individual Indians have the right to sue the United States for money damages under the Tucker Act, 28 U.S.C. § 1491, the same as non-Indian plaintiffs. The first such case of which we are aware that was characterized as a breach of trust claim is *Klamath and Modoc Tribes* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966). In that case, a number of individual Indians (and the Klamath Tribe) sued under 28 U.S.C. §§ 1491 and 1505 for a general accounting of trust funds. The Court of Claims held that it did not have jurisdiction to order a general accounting, but stressed that it did have jurisdiction over the claims for damages based upon the mismanagement of Indian trust funds and property by the United States:

> "We emphasize that our action today [refusing to order the United States to prepare an accounting] does not leave the Klamath Tribe and the individual Indians without a forum for the recovery of any damages to which they are entitled because of the Government's mishandling of tribal funds and property. No special jurisdictional act is required to provide that relief." [92]

In *Mason* v. *United States*, 461 F.2d 1364 (Ct.Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973), the Court of Claims upheld jurisdiction under the Tucker Act over a claim by an individual Indian heir alleging that the United States had breached its trust obligations by using trust funds to pay a state tax on the estate of a deceased Osage Indian. The Indian sought damages for the wrongful disbursements from the trust. The Court of Claims stated:

> "A suit against the United States on behalf of the estate of a non-competent Indian, for damages compensating the estate for breach by the Government of its trust obligation under a federal statute, is within 28 U.S.C. § 1491 as a claim founded upon an Act of Congress and for damages 'in cases not sounding in tort.' " [93]

Contrary to the Government's assertion (Br. 26 n.15), the jurisdictional issue *was* contested and briefed by both sides in the Court of Claims. Apparently, the Government decided to abandon the jurisdictional issue in this Court, and it was not argued again. This Court did, however, note that the Government owed "great care in administering its trust," and that jurisdiction was based upon 28 U.S.C. § 1491.[94]

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[92] 364 F.2d at ——. *Cf.* four other Indian cases upholding jurisdiction under 28 U.S.C. § 1491. Though these were not expressly characterized as breach of trust claims, the existence of the fiduciary relationship was important. *Fields* v. *United States*, 423 F.2d 380 (Ct. Cl. 1970); *Hebah* v. *United States*, 428 F.2d 1334 (Ct. Cl. 1970); *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971); *Quinault Allottee Ass'n* v. *United States*, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974). The latter two were decisions involving some of the instant plaintiffs.

[93] 461 F.2d at 1374.

[94] 412 U.S. at 391, and 394 n.5.

B. *Suits by Tribes and Groups of Indians Under 28 U.S.C. § 1505.*

In four Court of Claims cases and two district court cases, jurisdiction was expressly or tacitly upheld under 28 U.S.C. § 1505 for Indian tribal and group claims against the Government for breach of trust.

In *Klamath and Modoc Tribes* v. *United States, supra,* the Court of Claims held that it had jurisdiction over the tribal claims for damages based upon the mismanagement of Indian trust property by the United States.[95]

In *Navajo Tribe* v. *United States,* 364 F.2d 320 (Ct. Cl. 1966), the Navajo Tribe alleged that it had received inadequate compensation under three oil and gas leases on its lands. Two of the claims were made under a special jurisdictional act and the third under 28 U.S.C. § 1505. No question of the Court of Claims' jurisdiction was apparently ever raised, and the court evaluated all three claims on the merits, awarding damages on two and denying relief on the third.

In *Cheyenne-Arapaho Tribes* v. *United States,* 512 F.2d 1390 (Ct.Cl. 1975), a number of Indian tribes brought suit under 28 U.S.C. § 1505 claiming damages for the Government's mismanagement in handling tribal funds. The Court of Claims upheld jurisdiction over the claims, citing Section 1505 and stating:

> "[B]ecause the United States in effect imposes trust status on the Indian funds, our jurisdiction to review discretionary acts of the Secretaries of the Interior and Treasury in administering the trust is broad enough to cover the types of claims made here.[96]

Finally, in *Coast Indian Community* v. *United States,* 550 F.2d 639 (Ct.Cl. 1977), a case decided after *Testan,*

[95] 364 F.2d at ——.

[96] 512 F.2d at 1392.

the Court of Claims upheld the claim of an unincorporated association of Indians, presumably brought under 28 U.S.C. § 1505, that the Government as trustee had sold a logging right-of-way over their land for inadequate consideration. In finding a breach of fiduciary duty and awarding damages, the court implicitly held that it had jurisdiction over the claim.

Similarly, two district court cases have awarded damages in Indian breach of trust claims under the Tucker Act. *Manchester Band of Pomo Indians* v. *United States,* 363 F. Supp. 1238 (N.D. Cal. 1973), and *Smith* v. *United States,* Nos. C-74-1016 and C-74-1061 (N.D. Cal. 1979).

In view of the foregoing cases, it had been generally thought that the jurisdiction of the Court of Claims over breach of trust claims was well settled.

CONCLUSION

For the foregoing reasons, the decision of the Court of Claims should be affirmed.

Respectfully submitted,

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September 24, 1979

APPENDIX

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

[INTERIOR SEAL]

Nov. 21, 1978

Honorable James W. Moorman
Assistant Attorney General
United States Department of Justice
Washington, D.C. 20530

Re: *United States* v. *Maine*

Dear Mr. Moorman:

By letter of October 20, 1978, to the Attorney General, I requested that Justice not file any pleading designed to advise the federal district court of the government's view of the nature of the trust relationship between the United States and Indian tribes. I hereby reaffirm the views set forth in my October 20 letter. I did suggest in the letter, however, that Justice and Interior continue to work on the legal questions concerning the government's trust responsibility.

Congress has reposed principal authority for "the management of all Indian affairs and of all matters arising out of Indian relations" with this Department. 25 U.S.C. Sec. 2. As you no doubt realize, any legal memorandum filed by the Attorney General on such a broad issue as the trust responsibility would have far reaching policy implications. We have serious reservations about the statement as originally drafted and I am attaching a line by line critique, as promised, as a way to highlight some of the disputed issues. To be of further assistance to you, set forth below is this Department's view of the

legal obligations of the United States, as defined by the courts, with respect to Indian property interests.

That the United States stands in a fiduciary relationship to American Indian tribes, is established beyond question. The specific scope and content of the trust responsibility is less clear. Although the law in this area is evolving, meaningful standards have been established by the decided cases and these standards affect the government's administration of Indian policy. Our discussion is confined to the government's responsibilities concerning Indian *property* interests and should be understood in that context. Our conclusions may be summarized as follows:

1. There is a legally enforceable trust obligation owed by the United States Government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indians.

2. While Congress has broad authority over Indian affairs, its actions on behalf of Indians are subject to Constitutional limitations (such as the Fifth Amendment), and must be "tied rationally" to the government's trust obligation; however, in its exercise of other powers, Congress may act contrary to the Indians' best interests.

3. The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.

4. Executive branch officials have discretion to determine the best means to carry out their responsibilities to the Indians, but only Congress has the power to set policy objectives contrary to the best interests of the Indians.

5. These standards operate to limit the discretion not only of the Secretary of the Interior but also of the Attorney General and other executive branch officials.

ORIGIN OF THE DOCTRINE

The origin of the trust relationship lies in the course of dealings between the discovering European nations and (later the original states and the United States) the Native Americans who occupied the continent. The interactions between these peoples resulted in the conclusion by this country of treaties and agreements recognizing the quasi-sovereign status of the Native American tribes.

The Supreme Court has stated that:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943).

Inplicitly, the Court recognized the course of history by which the Indian tribes concluded treaties of alliance or —after military conquest—peace and reconciliation with the United States. In virtually all these treaties, the United States promised to extend its protection to the tribes. Consequently, the trust responsibility to Native Americans has its roots for the most part in solemn contracts and agreements with the tribes. The tribes

ceded vast acreages of land and concluded conflicts on the basis of the agreement of the United States to protect them from persons who might try to take advantage of their weak position. No comparable duty is owed to other United States citizens.

While the later executive agreements and presidential orders implementing them with tribes are shorter and less explicit than the treaties, a similar guarantee of protection can be implied from them. As the Court stated recently in *Morton* v. *Mancari*, 417 U.S. 535 (1974), then, "the unique legal status of Indian tribes under federal law (is) . . . based on a history of treaties and the assumption of a guardian-ward status."

The treaties and agreements represented a kind of land transaction, contract, or bargain. The ensuing special trust relationship was a significant part of the consideration of that bargain offered by the United States. By the treaties and agreements, the Indians commonly reserved part of their aboriginal land base and this reservation was guaranteed to them by the United States. By administrative practice and later by statute, the title to this land was held in trust by the United States for the benefit of the Indians.

From the beginning, the Congress was a full partner in the establishment of the federal trust responsibility to Indians. Article III of the Northwest Ordinance of 1787, which was ratified by the first Congress assembled under the new Constitution in 1789, 1 Stat. 50, 52, declared:

> The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be

> made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

And in 1790, Congress enacted the Non-Intercourse Act, 1 Stat. 137, 138, now codified as 25 U.S.C. § 177, which itself established a fiduciary obligation on the part of the United States to protect Indian property rights. *See Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975), and *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 677-699 (9th Cir. 1976).

Articulation of the concept of the federal trust responsibility as including more protection than simple federal control over Indian lands evolved judicially. It first appeared in Chief Justice Marshall's decision in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831). *Cherokee Nation* was an original action filed by the tribe in the Supreme Court seeking to enjoin enforcement of state laws on lands guaranteed to the tribe by treaties. The Court decided that it lacked original jurisdiction because the tribe, though a "distinct political community" and thus a "state," was neither a State of the United States nor a foreign state and was thus not entitled to bring the suit initially in the Court. Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations. . . in a state of pupilage" and that "their relation to the United States resembles that of a ward to his guardian." Chief Justice Marshall's subsequent decision in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), reaffirmed the status of Indian tribes as self-governing entities without, however, elaborating on the nature or meaning of the guardian-ward relationship.

Later in the nineteenth century, the Court used the guardianship concept as a basis for congressional power, separate and distinct from the commerce clause. *United States* v. *Kagama*, 118 U.S. 375 (1886), concerned the

constitutionality of the Major Crimes Act. Although it concluded that this statute was outside the commerce power, the Court sustained the validity of the act by reference to the Government's fiduciary responsibility. The Court stated that "[t]hese Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power."

A number of cases in the decades on either side of 1900 make express reference to such a power based on the federal guardianship, e.g., *LaMotte* v. *United States*, 254 U.S. 570, 575 (1921) (power of Congress to modify statutory restrictions on Indian land is "an incident of guardianship"); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property"), and the Supreme Court has continued to sustain the constitutionality of Indian statutes as derived from an implicit power to implement the "unique obligation" and "special relationship" of the United States with tribal Indians. Cf. *Morton* v. *Mancari*, 417 U.S. 345, 552, 555 (1973).

LIMITATIONS ON CONGRESS

Congressional power over Indian affairs is subject to constitutional limitations. While Congress has the power to abrogate Indian treaties, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), Indian property rights are protected from repeal by the Fifth Amendment, *Choate* v. *Trapp*, 224 U.S. 665, 678 (1912). The Supreme Court held in *Chippewa Indians* v. *United States*, 301 U.S. 358 (1937), that

> * * * Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith

> for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own. * * * (P. 375-376).

In addition to these constitutional limitations on Congress' power to implement its trust responsibility, the Court has observed that the guardianship "power to control and manage" is also "subject to limitations inhering in a guardianship," *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935), although the cases do not clarify with precision what limitations "inhere in a guardianship" so far as Congress is concerned. Recent cases have, however, considered the United States' trust obligations as an independent limiting standard, for judging the constitutional validity of an Indian statute, rather than solely a source of power. In *Morton* v. *Mancari*, 417 U.S. 535 (1974), the Supreme Court upheld the constitutionality of a statute granting Indians an employment preference in the Bureau of Indian Affairs, stating:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indian, such legislative judgments will not be disturbed. Id. at 555.

Delaware Tribal Business Council v. *Weeks*, 430 U.S. 73 (1977), expressly held that the plenary power of Congress and the separation of powers shield "does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny." The Court in *Weeks* took the significant step of examining on the merits claims by one group of Indians that legislation had denied them due process, and it applied the above-quoted standard from *Mancari*.

This standard, in practice, does not suggest that a reviewing court will second guess a particular determina-

tion by Congress that a statute in fact is an appropriate protection of the Indians' interests. Congressional discretion seems necessarily broad in that respect. But the power of Congress to implement the trust obligation would not seem to authorize enactments which are manifestly contrary to the Indians best interests. This does not mean that Congress could never pass a statute contrary to its determination that the Indians' best interests are served by it. Congress in its exercise of other powers such as eminent domain, war, or commerce, may act in a manner inimical to Indians. However, where Congress is exercising its authority over Indians, rather than some other distinctive power, the trust obligation would appear to require that its statutes must be based on a determination that the protection of the Indians will be served. Otherwise, a statute would not be rationally related to the trusteeship obligation to Indians. Cf., *Fort Berthold Reservation* v. *United States*, 390 F.2d 686, 691-693 (Ct. Cl. 1968).

The trust obligations of the United States constrain congressional power in another way. Since it is exercising a trust responsibility in its enactment of Indian statutes, courts presume that Congress' intent toward the Indians is benevolent. Accordingly, courts construe statutes (as well as treaties) affecting Indians as not abrogating prior Indian rights or, in case of ambiguity, in a manner favorable to the Indians. E.g., *United States* v. *Santa Fe Pacific Ry.*, 314 U.S. 339 (1941). This presumption is rebuttable in that the courts have also held that Congress can unilaterally alter treaty rights or act in a fashion adverse to the Indians interests—even to the point of terminating the trust obligation. But such an intent must be "clear," "plain" or "manifest" in the language or legislative history of an enactment. *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).

LIMITATION ON ADMINISTRATIVE DISCRETION

In Indian, as in other matters, federal executive officials are limited by the authority conferred on them by statute. In addition, the federal trust responsibility imposes fiduciary standards on the conduct of the executive —unless, of course, Congress has expressly authorized a deviation from those standards. Since the trust obligation is binding on the United States, fiduciary standards of conduct would seem to pertain to all executive departments that may deal with Indians, not just those such as the Departments of Interior and Justice which have special statutory responsibilities for Indian affairs. This principle is implicit in *United States* v. *Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976), where the court employed the canon of construction that ambiguous federal statutes should be read to favor Indians to thwart the efforts of the Army Corps of Engineers to take tribal land.

A number of court decisions hold that the federal trust responsibility constitutes a limitation upon executive authority and discretion to administer Indian property and affairs. A leading case is *United States* v. *Creek Nation*, 295 U.S. 103 (1935), where the Supreme Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages against the United States for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The Court bottomed its decision on the federal trust doctrine:

> The tribe was a dependent Indian community under the guardianship of the United States and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting

and advancing the tribe, it was subject to *limitations inhering in such a guardianship* and to pertinent constitutional restrictions. 295 U.S. at 109-110. (emphasis added)

Creek Nation stands for the proposition that—unless Congress has expressly directed otherwise—the federal executive is held to a strict standard of compliance with fiduciary duties. For example, the executive must exercise due care in its administration of Indian property; it cannot as a result of a negligent survey "give the tribal lands to others, or . . . appropriate them to its own purposes." Other decisions of the Supreme Court reviewing the lawfulness of administrative conduct managing Indian property have held officials of the United States to "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297, (1942); *United States* v. *Payne*, 264 U.S. 446, 448 (1924). Decisions of the Court of Claims have also held that the ordinary standards of a private fiduciary must be adhered to by executive officials administering Indian property. E.g., *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977); *Cheyenne-Arapahoe Tribes* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 18-19 (1944); *Navajo Tribe* v. *United States*, 364 F.2d 320, 322-324 (Ct. Cl. 1966).

Creek Nation and the other cited cases were for money damages under special jurisdictional statutes in the Court of Claims. Other decisions have granted declaratory and injunctive relief against executive actions in violation of ordinary fiduciary standards. An important example is *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), where the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, "would not be an exercise of the guardianship, but an act of confiscation." 249 U.S. at 113.

Federal officials as trustees are not insurers. The case of *United States* v. *Mason*, 411 U.S. 391 (1973), sustains as reasonable a decision by the Interior Department not to question certain state taxes on trust property. But the case law in recent years generally holds executive action to be reviewable both under the terms of specific statutes and for breach of obligations of an ordinary trustee. A significant recent federal district court decision, *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972), enjoins certain diversions of water for a federal reclamation project which adversely affected a downstream lake on an Indian reservation. Although the diversions violated no specific statute or treaty, the court held them in violation of the trust responsibility.

The court held that the Secretary of the Interior—as trustee for the Indians—was obliged to discharge his potentially conflicting duty to administer reclamation statutes in a manner which does not interfere with Indian rights. The court restrained the diversions because the Secretary's activities failed "to demonstrate an adequate recognition of his fiduciary duty to the Tribe." The Department of Justice acquiesced in this decision and chose not to appeal.

If, as we believe, the decisions in such cases as *Creek Nation*, *Pueblo of Santa Rosa*, and *Pyramid Lake* are sound, it follows that executive branch officials are obliged to adhere to fiduciary principles. These cases, in other words, lead to the conclusion that the government is in fact a trustee for the Indians and executive branch officials must act in accordance with trust principles unless Congress specifically directs otherwise.

INDEPENDENT EXISTENCE

In addition, the decided cases strongly suggest that the trust obligation of the United States exists apart from specific statutes, treaties or agreements. As previously stated, the Supreme Court in *United States* v. *Kagama*, 118 U.S. 375 (1886), sustained the validity of the Major Crimes Act on the basis of the trust relationship, separate and apart from other constitutional powers. And *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), *United States* v. *Creek Nation*, 295 U.S. 103 (1935), and *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972), apply the trust responsibility to restrain executive action without regard to any specific treaty, statute or agreement.

This view is reinforced by reference to the origins of the trust responsibility doctrine. Originally, Great Britain claimed for itself sovereignty over all Indian lands in the English colonies. In 1763, the King issued a Royal Proclamation, the precursor of the federal Non-Intercourse Act, decreeing that Indian lands were owned by the Crown and that no person or government could acquire such lands without the consent of the Crown. This policy reflected the practical need of the Crown to assert its control over the land and wealth of the colonies and to preserve peace among the colonists and the Indians. Notably, the 1763 Proclamation applied to all Indians without regard to the presence or absence of specific treaties or agreements.

When the United States acquired sovereignty from Great Britain, it succeeded to all the incidents of the prior sovereign's power. The United States not only did not renounce the peculiar power and duty assumed by Great Britain over Indians, but endorsed it by specific reference in Article I of the Constitution.

The recent decision in *Delaware Tribal Business Council* v. *Weeks*, 430 U.S. 73 (1977), holds that the trust responsibility is subject to due process limitations. *Weeks* holds that Congress is not free to legislate with respect to Indians in any manner it chooses; rather, Congressional action with respect to Indians is subject to judicial review and will be sustained only so long as it can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

Other recent Supreme Court opinions shed further light on what is meant by the "unique obligation toward the Indian." In *Morton* v. *Ruiz*, 415 U.S. 199 (1974), the Court in holding that the Bureau of Indian Affairs erred in excluding a certain category of Indians from the benefits of its welfare program spoke of the "overriding duty of our Federal Government to deal fairly with Indians." 415 U.S. at 236. This statement appears as part of the procedural rights of Indians, and in this connection the Court cited *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942), which says governmental action must be judged by the "strictest fiduciary standards." Most recently, in *Santa Clara Pueblo* v. *Martinez*, —— U.S. —— (1978), the court reviewed the record of limited Indian participation in the hearings on the Indian Civil Rights Act and said:

> It would hardly be consistent with "the overriding duty of our Federal Government to deal fairly with Indians," *Morton* v. *Ruiz*, 415 U.S. 199, 236 (1974), lightly to imply a cause of action on which the tribes had no prior opportunity to present their views. —— U.S. ——, —— n.30 (1978).

The "unique obligation" mentioned in *Weeks* and the "overriding duty" of fairness discussed in *Ruiz* and *Martinez* exist apart from any specific statute, treaty or agreement, and they impose substantive constraints on the Congress (*Weeks*), the Executive (*Ruiz*) and the Ju-

diciary (*Martinez*) with respect to Indians. These recent decisions of the Supreme Court lead to the conclusion that the government's trust responsibility to the Indian has an independent legal basis and is not limited to the specific language of the statutes, treaties and agreements.

At the same time, however, the content of the trust obligation—apart from specific statutes and treaties—is limited to dealing fairly, not arbitrarily, with the Indians both with respect to procedural and substantive issues. The standard of fairness is necessarily vague and allows considerable room for discretion. But these independently based duties do not stand alone. They must be read together with the host of statutory and treaty provisions designed to provide protection for Indian interests. Illustrative of such statutes are 25 U.S.C. Sec. 81 (contracts); 25 U.S.C. Sec. 175 (legal representation); 25 U.S.C. Sec. 177 (conveyance of property); 25 U.S.C. Sec. 194 (burden of proof in property cases); 25 U.S.C. Secs. 261-264 (regulation of traders); 25 U.S.C. Sec. 465 (acquisition of land in trust).

The more general notions of the "unique obligations" and "overriding duty" of fairness form a backdrop for the construction and interpretation of the statutes, treaties, and agreements respecting the Indians. This means that provisions for the benefit of Indians must be read to give full effect to their protective purposes and also they must be given a broad construction consistent with the trust relationship between the government and the Indians. General notions of fiduciary duties drawn from private trust law form appropriate guidelines for the conduct of executive branch officials in their discharge of responsibilities toward Indians and are properly utilized to fill any gaps in the statutory framework.

SPECIFIC OBLIGATIONS

The decided cases set forth a number of specific obligations of the trusteeship. *Navajo Tribe* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966). During the second World War, an oil company had leased tribal land for oil and gas purposes. Upon discovering helium, bearing noncombustible gas which it had no desire to produce, the company assigned the lease to the Federal Bureau of Mines. The Bureau developed and produced the helium under the terms of the assigned lease instead of negotiating a new, more remunerative lease with the tribe. In *Navajo*, the court analogized these facts to the case of a "fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself," and held the action unlawful. *Pyramid Lake* discussed above also involves the fiduciary duty of loyalty.

Manchester Band of Pomo Indians v. *United States*, 363 F. Supp. 1238 (N.D. Cal., 1973), holds that the government as trustee has a duty to make trust property income productive. The federal district court held, in that case, that officials of this Department had violated their trust obligations by failing to invest tribal funds in nontreasury accounts bearing higher interest than was paid by treasury accounts. *Menominee Tribe* v. *United States*, 101 Ct. Cls. 10 (1944), also enforces the fiduciary obligation to make trust property income productive.

Pyramid Lake Paiute Tribe v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972), imposes on the United States the duty to enforce reasonable claims of the beneficiary. This duty may be seen as related to the duty of loyalty. In *Pyramid Lake*, the court rejected an accommodation of public interests and trust obligations and held that the Secretary of Interior had a higher obligation to protect Indian property rights than to advance public projects within his charge—again, absent an express direction from Con-

gress. Where there is a dispute between Indians and other government interests, executive branch officials are required to favor the Indian claim so long as it is reasonable.

The Supreme Court has held that executive branch officials are not required to advance or accede to every colorable claim which may be suggested by an Indian tribe. *United States* v. *Mason*, 412 U.S. 391 (1973). It appears that the government may properly examine these claims critically and make a dispassionate analysis of their merit, it may consider whether the advancement of a particular claim is in the long term best interests of the Indians, and it may determine the timing and the forum in which a claim is advanced. But executive branch officials may not reject or postpone the assertion of a claim on behalf of Indians on the ground that it would be inimical to some other governmental or private interest or refuse to advance an Indian claim on the ground that it is merely "reasonable" as opposed to clearly "meritorious." Although trust duties are neither rigid nor absolute, the controlling principle is that executive branch officials must act in the best interests of the Indians.

The Supreme Court has held that the United States as trustee has some discretion to exercise reasonable judgment in choosing between alternative courses of action. *United States* v. *Mason*, 412 U.S. 391 (1973). In *Mason*, Indian allottees claimed that Bureau of Indian Affairs officials erred in paying state estate tax assessments on trust properties. Bureau officials relied on a prior decision of the Supreme Court which had sustained the particular taxes in question. With some plausibility, however, the allottees claimed that subsequent Supreme Court decisions had eroded the vitality of the earlier case. The Court determined that in this instance the trustee had acted reasonably by paying the taxes without protest. In *Mason*, unlike *Pyramid Lake*, there was no suggestion that any conflicting interests had detracted from the trustee's duty of loyalty to the Indians, and the case stands for the proposition that in the nonconflict situation, the trustee's reasonable judgments will be sustained.

Another principle which follows from this reading of the Indian trust cases is that affirmative action is required by the trustee to preserve trust property, particularly where inaction results in default of trust rights. Cf., *Poafybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369 (1968); *Edwardsen* v. *Morton*, 369 F. Supp. 1359 (D.D.C. 1973). The water rights area is a prime example. The Indians' rights to water pursuant to cases like *Winters* v. *United States*, 207 U.S. 564 (1908), and *Arizona* v. *California*, 373 U.S. 546 (1963), is prior to any subsequent appropriations. But failure of the trustee in the past to assert or protect these rights, and to assist in construction of Indian irrigation projects, has led non-Indian ranchers and farmers to invest large sums in land development in reliance on the seeming validity of their appropriations. See *Report of the National Water Commission*, ch. 14 (1973). The trust obligation would appear to require the trustee both to take vigorous affirmative action to assert or defend these Winters Doctrine claims. See, *Pyramid Lake Paiute Tribe* v. *Morton*, *supra*.

The impact of these principles upon the public administration within the government appears to be surprisingly modest, for present policies are essentially consistent with the dictates of the trust responsibility. In the area of water rights, for example, President Carter has called for the prompt quantification of Indian claims and their determination through negotiation if possible or litigation if necessary, and he has also called for development of Indian water resources projects so that the Indian rights may be put to beneficial use. The President's perception of the government's responsibility in this area appears entirely consistent with the dictates of the trust responsi-

bility doctrine. The obligation of executive branch officials is to implement the President's policy. Similarly, the Departments of Interior and Justice are engaged in the process of enforcing reasonable Indian claims in some instances by negotiation and in others through litigation. The Bureau of Indian Affairs works to make trust property income productive and the present Secretary of the Interior, so far as we are aware, has taken no action inconsistent with his duty of loyalty to the Indians.

Even if the imposition of the trust responsibility doctrine is assumed to be completely consistent with present policy and administrative practice, the doctrine clearly places constraints on the future policy formulation and administrative discretion. Executive branch officials have some discretion in the discharge of the trust, but it is limited. For example, they may make a good faith determination that the compromise of an Indian claim is in the long term best interests of the Indians, but they are not free to abandon Indian interests or to subordinate those interests to competing policy considerations. Flexibility in setting policy objectives rests with Congress which alone is free to direct a taking or subordination of the otherwise paramount Indian interests.

Instances will surely arise where the discharge of trust responsibilities to the Indians raises unmanageable, practical or political difficulties for executive branch officials. It may be that congressional appropriations are inadequate to carry out a perceived duty—say, the quantification of Indian water entitlements—or that the enforcement of trust responsibilities results in an extraordinary intense political backlash against the administration. Under such circumstances, it would seem that the responsibility of executive branch officials would be to seek express direction from the Congress. The existence of this congressional safety valve assures that the legal trust responsibility to American Indians is a viable doctrine not only now but in the future as well.

THE DEPARTMENT OF JUSTICE

The remainder of this memorandum will address some of the more specific questions which have been raised by the Attorney General in connection with litigation by the Department of Justice on behalf of Indians. How does Indian litigation differ, if at all, from other litigation handled by the Department of Justice? Do special standards constrain the prosecutorial discretion of the Attorney General?

By statute, the conduct of litigation in which the United States is a party is reserved to the officers of the Department of Justice under the direction of the Attorney General. 28 U.S.C. 516, 519. In addition, the United States Attorneys, under the direction of the Attorney General, are specifically authorized to represent Indians in all suits at law and in equity. 25 U.S.C. 175.

Generally, the Attorney General has broad discretion to determine whether and when to initiate litigation and on what theories. As the chief legal officer of the United States, the Attorney General may consider broad policy consequences of a litigation strategy and may refuse to initiate litigation despite the requests of a particular agency.

The discretion of the Attorney General with respect to the initiation of litigation is not unlimited. First, the exercise of prosecutorial discretion by the Attorney General is subject to judicial review in order to insure that the Attorney General's decision is based on a correct understanding of the law. *Joint Tribal Council of the Passamaguoddy Tribe* v. *Morton*, 388 F. Supp. 649, 665-666 (D. Me. 1975), aff'd, 528 F.2d 370 (1st Cir. 1975). Cf. e.g., *Nader* v. *Saxbe*, 497 F.2d 676, 679-680 n. 19 (D.C. Cir. 1974). And second, all executive branch officials including the Attorney General can be required by the judiciary to "faithfully execute the laws" which, in some

instances, may require the initiation of litigation. E.g., *Adams* v. *Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972), 356 F. Supp. 921 (D.D.C. 1973), mod. and aff'd., 480 F.2d 1159 (D.C. Cir. 1973).

In the case of Indian litigation, the Attorney General's discretion is somewhat more limited than in other areas. As under the principles discussed above, an officer of the executive branch of government the Attorney General acts as a fiduciary and must accord the Indians a duty of loyalty. This means that in the exercise of discretion the Attorney General may not refuse to initiate litigation on the ground that it would be inimical to the welfare of some other governmental or private interest. And the Supreme Court has suggested that the Attorney General has an affirmative obligation to institute litigation on behalf of Indians. *Poafybitty* v. *Skelly Oil*, 390 U.S. 365, 369 (1968).

The Attorney General has no obligation to assert every claim or theory advanced by an Indian tribe without regard to its merit. At the same time, the Attorney General may not abandon reasonable Indian claims on any ground other than the best interests of the Indians. Further, in the exercise of discretion, the Attorney General must take care that litigation decisions do not undercut the efforts of the Secretary of Interior or other executive branch officials to discharge their trust responsibilities to the Indians. As the Supreme Court recently stated: "Where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not repudiate it." *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 (1972). Indeed, published opinions of the Attorney General reflect the great deference which has been accorded by the Department of Justice to the decisions of the Secretary of Interior. 25 Op. Atty. Gen. 524, 529 (1905); 20 Op.

Atty. Gen. 711, 713 (1894); 17 Op. Atty. Gen. 332, 333 (1882).

The fulfillment of this nation's trust responsibility to American Indians is one of the major missions of this Department. Both the President and the Vice-President have publicly stated their support of the trust responsibility as a matter of policy.

The definition of the government's trust responsibilities to Native Americans involves both legal and policy issues. The President's P.R.I.M. process is designed to assure development of policy after input from all concerned. It would be unfortunate to preempt this process by filing a memorandum in a court case that was not asked for by the judge and is not necessary to the litigation which will be moot if Congress and the tribes approve. If the Attorney General wants to address the legal issues regarding the trust responsibility, it would be more appropriate to do so through a formal Attorney General's opinion.

Sincerely

LEO M. KRULITZ

Solicitor

[Ed. note: This letter received wide distribution among Indian tribal representatives.]